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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1726

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Petitioner,

vs.

GEORGE K. WYMAN, Individually and as Commissioner of the Department of Social Services of the State of New York, and CHARLES BUGNACKI, EARL M. AUSLANDER, THOMAS GENTILE, etc.,

Respondents,

JOHN L. LASCARIS, Commissioner of the Department of Social Services of Onondaga County, New York,

Appellant-Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN OPPOSITION FOR RESPONDENTS CHARLES BUGNACKI, EARL M. AUSLANDER, THOMAS GENTILE, etc.

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Rules Involved	2
Statement	3
Argument	4
I — The Chamber Lacks Standing to Petition for a Writ of Certiorari	5
A. This Court Lacks Power to Review the Denial of Party Status to the Chamber	5
B. Denial of Party Status to the Chamber is Proper	6
1. Intervention as of Right	6
2. Intervention by Permission	8
II — There is No Conflict of Decision	9
III — The Decision Below is Based on Adequate and Independent State Grounds	11
IV — There is No Important Question of Federal Law	11
V — The Case is Presently Moot	12
Conclusion	13

CASES CITED

Abramson v. *Pennwood Investment Corp.*, 11 FR Serv.2d 24c.13, Case 1, p. 718 (E.D.N.Y. 1967) *aff'd.*, 11 FR Serv. 2d 24c.13, Case 2 (2nd Cir. 1968)	8
Automobile Workers v. *Scofield*, 382 U.S. 205 (1965)	5, 6
Cascade Natural Gas Corp. v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967)	7
Dandridge v. *Williams*, 397 U.S. 471 (1970)	11, 12

Page

Dow Chemical Company v. *Taylor*, No. 38664 (E.D.Mich) . 10

Francis v. *Davidson*, 340 F.Supp. 351, *aff'd sub. nom: Davidson* v. *Francis*, 41 U.S.L.W. 3199 (U.S. October 19, 1972) 9, 11

Grinnell Corporation v. *Hackett*, 475 F.2d 449 (1st Cir. 1973) 7, 10

Hobson v. *Hansen*, 11 FR Serv.2d 24a.2, 676 (D.D.C. 1968) 6

Interstate Railway Co. v. *Massachusetts*, 207 U.S. 79 (1907) 11

ITT Lamp Div. v. *Minter*, 435 F.2d 989 (1st Cir.) *cert. denied*, 402 U.S. 933 (1970) 5, 7, 9, 10, 11

Lascaris v. *Wyman and Bugnacki, et al., 68 M.2d 523* [*Sup.* Ct. Onondaga Co. 1971) *rev'd*, 38 A.D.2d 163 (4th Dep't 1972) *aff'd*, 31 N.Y.2d 386 (1972) 4, 6, 7, 9, 11, 12

Louisville & Nashville R. Co. v. *Western Union Telegraph Co.*, 237 U.S. 300 (1915) 11

Miller's Executors v. *Swann*, 150 U.S. 132 (1893) 11

Missouri-Kansas Pipeline Co. v. *United States, 312 U.S. 502* (1941) 7

Murdock v. *City of Memphis*, 87 U.S. 590 (1874) 11

New Orleans Water Works Co. v. *New Orleans*, 164 U.S. 471 (1896) 8

Nuesse v. *Camp*, 385 F.2d 694 (D.C. Cir. 1967) 7

Pepsico, Inc. v. *F.T.C.*, 472 F.2d 179 (2nd Cir. 1972) 7

Railroad Trainmen v. *Baltimore & O.R. Co.*, 331 U.S. 519 (1947) 5

Russo v. *Kirby*, 335 F.Supp. 122 (E.D.N.Y.) *rev'd on other grounds*, 453 F.2d 548 (2nd Cir. 1971) 9, 11

Page

Russo v. *Kirby*, Civil No. 71-C-1237 (E.D.N.Y. November 16, 1971) 6, 7

Strat-O-Seal Mfg. Co. v. *Scott*, 72 Ill.App.2d 480, 218 N.E. 2d 227 (1966) 9

Super Tire Engineering Co. v. *McCorkle*, —F.Supp.— ( ) *vacated as moot*, 469 F.2d 911 (3rd Cir. 1972) *pet. cert. pend.*, 72-1554 ..... 9, 12

Textile Workers v. *Allendale Co.*, 226 F.2d 765 (D.C. Cir. 1955) 7

U.S. Chamber of Commerce v. *Francis*, 41 U.S.L.W. 3043 (U.S. July 11, 1972), *appeal dismissed*, 41 U.S.L.W. 3199 (U.S. October 17, 1972) 6, 9

Western Union Company v. *Pennsylvania*, 368 U.S. 71 (1961) 8

Wolpe v. *Poretsky*, 144 F.2d 505 (D.C. Cir.) *cert. den.*, 323 U.S. 777 (1944) 8

STATUTES AND RULES

Rules of the Supreme Court, Rule 39 2

28 U.S.C 1257(3) 2

Federal Rules of Civil Procedure, Rule 24 ..... 5, 6, 8

Civil Practice Law and Rules, State of New York, Sec. 1013 ..... 4, 5, 8

Social Services Law, State of New York, Sec. 131 ..... 3, 11

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GEORGE K. WYMAN, Individually and as Commissioner of the Department of Social Services of the State of New York, and CHARLES BUGNACKI, EARL M. AUSLANDER, THOMAS GENTILE, etc.,

Respondents,

JOHN L. LASCARIS, Commissioner of the Department of Social Services of Onondaga County, New York,

Appellant-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION FOR RESPONDENTS CHARLES BUGNACKI, EARL M. AUSLANDER, THOMAS GENTILE, etc.

OPINIONS BELOW

The opinion of the New York Court of Appeals (Appendix A of Petition, p. A1-A9) is reported at 31 N.Y.2d 386. The opinion of the New York Supreme Court, Appellate Division (Appendix F of Petition, p. A18-A26) appears at 38 A.D.2d 163. The opinion of the New York Supreme Court, Motion Term (Appendix E of Petition, p. A14-A17) appears at 68 M.2d 523.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

A motion for reargument was denied on May 4, 1973 (Appendix C of Petition, p. A11) and the petition was filed on June 20, 1973. However, said petition did not conform with Rule 39 of the Rules of this Court, in that it was not printed. The petition must therefore be dismissed for that reason, and for the reasons hereinafter set forth.

QUESTIONS PRESENTED

1. Is denial of party status to the Chamber reviewable by this Court?

2. Is the decision below reviewable by this Court?

STATUTES AND RULES INVOLVED

Section 1013 of the Civil Practice Law and Rules:

"§1013. Intervention by permission.

Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party."

Rule 24 of the Federal Rules of Civil Procedure provides, in relevant part:

"(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

"(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

"(c) PROCEDURE . . . . The motion shall state the grounds therefore and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. . . ."

The relevant parts of Section 131 of the Social Services Law of the State of New York are set forth in Appendix G of the petition (p. A27-A31).

STATEMENT

The case was commenced as a declaratory judgment action seeking an interpretation of Section 131 of the Social Services Law of the State of New York (Appendix G of Petition, p. A27-A31). It was brought by John L. Lascaris, Commissioner of the Department of Social Services of Onondaga County (hereafter "Lascaris"); commenced by service of a Summons and Complaint upon George K. Wyman, Commissioner of the Department of Social Services of the State of New York (hereafter "Wyman"). The action arose out of a strike by employees of the New York Telephone Company represented by the Communications Workers of America. Shortly after the strike commenced Lascaris received applications from strikers for welfare assistance under Section 131 of the New York Social Services Law. Said applications were summarily denied on the grounds that a recent amendment to Section 131 made strikers ineligible thereunder.

After the filing of the suit Charles Bugnacki, 1/ Earl M. Auslander, Thomas Gentile, individually and on behalf of all

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1/ Erroneously named in the caption of the petition as George Bugnacki.

other members of Locals 1123, 1152, 1191 and 1197 of the Communications Workers of America, who are similarly situated, the said locals individually and the Greater Syracuse Labor Council (all referred to hereafter as "Bugnacki, et al.") intervened, as of right. Bugnacki, et al. then moved to dismiss the complaint. The motion was treated as one for summary judgment, and granted in favor of Lascaris [*Lascaris* v. *Wyman and Bugnacki, et al.*, 68 M.2d 523 (Sup. Ct. Onondaga Co. 1971) (Appendix E of Petition, p. A14-A17)]. This decision was unanimously reversed by the Supreme Court, Appellate Division, which held that striking employees, otherwise qualified, were eligible to receive welfare benefits [*Lascaris* v. *Wyman and Bugnacki, et al.*, 38 A.D.2d 163 (4th Dep't. 1972) (Appendix F of Petition, p. A18-A26)]. This decision was unanimously affirmed by the New York Court of Appeals [*Lascaris* v. *Wyman and Bugnacki, et al.*, 31 N.Y.2d 386 (1972) (Appendix A of Petition, p. A1-A9)].

The Chamber of Commerce of the United States of America (hereafter "Chamber") sought permissive intervention [N.Y. Civil Practice Law and Rules §1013] before the Appellate Division and before the New York Court of Appeals. All such applications were denied, although the Chamber was permitted to participate as *amicus curiae*, and was permitted to present oral argument on the merits before the New York Court of Appeals. In toto, the Chamber sought permission to intervene *five* times — once before the Appellate Division; four times before the Court of Appeals. All such applications were denied.

ARGUMENT

The issues in the present case are uniquely narrow, and no amount of strained semantics can convert them into issues that this Court can or should review on certiorari. The initial question concerns the Chamber's "interest" in the case, an interest attenuated at best and in no event warranting intervention. The Chamber's "interest" is based upon the unsubstantiated assertion that granting welfare assistance may, in some manner, affect the collective bargaining process. This is

hardly the direct, substantial interest in the case warranting intervention. The Chamber, it is observed, neither pays nor receives welfare assistance.

The final question concerns review of the granting of welfare benefits to strikers. Since this Court originally denied certiorari on this issue in *ITT Lamp Div.* v. *Minter,* 402 U.S. 933 (1970) there has been no modification, no conflict of decisions, no important federal question raised with respect to this question. And the holding, that striking employees, where otherwise eligible, are entitled to receive welfare assistance is clearly correct. Therefore, there is no basis to review the decision below.

I

THE CHAMBER LACKS STANDING TO PETITION FOR A WRIT OF CERTIORARI.

A. This Court Lacks Power to Review the Denial of Party Status to the Chamber

Only a party to a case, or one improvidently denied party status, may seek review in this Court [*Automobile Workers* v. *Scofield,* 382 U.S. 205 (1965); *Railroad Trainmen* v. *Baltimore & O. R. Co.,* 331 U.S. 519 (1947)]. There are only two instances where denial of party status is subject to review: when intervention is a matter of right; when intervention is permissive and the denial is an abuse of discretion [*Railroad Trainmen* v. *Baltimore & O.R. Co., supra,* at 524-525].

The Chamber sought intervention in this case before the New York Appellate Division and Court of Appeals. By affidavits of Tracy H. Ferguson, dated November 23, 1971 and March 14, 1972, respectively, it is stated:

> "I make this affidavit in support of the Chamber's motion pursuant to CPLR Section 1013 . . ."

Section 1013 of the New York CPLR, substantively identical to Rule 24(b) of the Fed. R. Civ. Proc., provides for permissive intervention. Thus, the Chamber was denied intervention by permission, and not intervention "as of right."

As a result of the Chamber's erroneous implication that it applied for intervention as of right (Petition, p. 6), the Chamber does not assert that the denial of party status was an abuse of discretion. In any event, since the denial of its intervention was proper, and not an abuse of discretion, the Chamber is not a party to the case, and cannot petition for a writ of certiorari (*Automobile Workers* v. *Scofield, supra.*)

B. Denial of Party Status to the Chamber is Proper

1. Intervention as of Right

Although it has applied for intervention by permission in numerous cases, 2/ the Chamber now seemingly asserts, in this case, its intervention is suddenly a matter of right (Petition, p. 6). As to "intervention as of right," Rule 24(a) of the Fed. R. Civ. Proc. provides in relevant part:

> "Upon timely application anyone shall be permitted to intervene in an action . . .
> (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action. . . ."

In *Hobson* v. *Hansen*, 11 FR Serv.2d 24a.2. Case 6, p. 680 (D.D.C. 1968) examining the nature of that "interest", the court stated:

> "[R]equired for intervention is a direct, substantial, legally protectable interest in the proceedings."

The Chamber, neither pays nor receives welfare assistance, and yet asserts an interest, claiming that such payments have an impact on the collective bargaining process. This interest is hardly the direct interest called for by the law, and instead depends on such factors as "how many states permit strikers to receive welfare; whether or not strikes tend to be of longer duration where welfare is received; . . . how many strikers

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2/ *See, e.g., Russo* v. *Kirby*, Civil No. 71-C-1237 (E.D.N.Y. November 16, 1972); *U. S. Chamber of Commerce* v. *Francis*, 41 U.S.L.W. 3043 (U.S. July 11, 1972), *appeal dismissed*, 41 U.S.L.W. 3199 (U.S. October 17, 1972); *Lascaris* v. *Wyman and Bugnacki, et al., supra.*

actually do receive welfare benefits; and a host of other factors" [*ITT Lamp Div.* v. *Minter*, 435 F.2d 989, 993 (1st Cir.) *cert. denied*, 402 U.S. 933 (1970)].

Numerous courts have found that the impact of welfare assistance on collective bargaining is "minimal at best," thus rejecting the substantiality requisite of the Chamber's "interest" [*Grinnell Corp.* v. *Hackett*, 475 F.2d 449, 458 (1st Cir. 1973) *pet. cert. pend.*, No. 72-1679; *ITT Lamp Div.* v. *Minter*, *supra*, at 994; *see, also, Lascaris* v. *Wyman and Bugnacki, et al.*, *supra*]. Finally, the fact that the Chamber has no "legally protectable interest in the proceedings" is graphically demonstrated by the decision in *Russo* v. *Kirby*, Civil No. 71-C-1237 (E.D.N.Y. November 16, 1971). On the Chamber's motion to intervene the court stated:

> "[T]he Chamber was not aggrieved by defendant Kirby's denial of welfare benefits to strikers and would not have been a proper original party to the action by Kirby . . . ."

The Chamber's veritable catalogue of cases where intervention was granted merely emphasizes its lack of interest in these proceedings. Those cases concern: intervention by competitors in anti-trust suits where divestiture was designed to restore competition; 3/ competitors in an administrative hearing where the outcome directly determined the prices of competitors and wages of employees; 4/ commissioner of state banks charged with enforcing state banking laws where the action concerned federal banking laws allegedly in conflict with the state laws; 5/ parties to a contract, wherein the contract was the subject of the suit; 6/ adjoining property owners whose right to intervene was

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3/ *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *Missouri-Kansas Pipeline Co.* v. *United States*, 312 U.S. 502 (1941) (Petition, p. 6).

4/ *Textile Workers* v. *Allendale Co.*, 226 F.2d 765 (D.C. Cir. 1955) (Petition, p. 6).

5/ *Nuesse* v. *Camp*, 385 F.2d 694 (D.C. Cir. 1967) (Petition, p. 6).

6/ *Pepsico, Inc.* v. *F.T.C.*, 472 F.2d 179 (2nd Cir. 1972) (Petition, p. 6).

statutory; 7/ persons for whose benefit the statute in question was enacted; 8/ and the holder of property possibly subject to inconsistent judgments.9/ Clearly, the Chamber's interest here is much less direct and insubstantial than the intervenors possessed in the above cases.

It is obvious why the Chamber has consistently sought intervention by permission. The Chamber does not possess the requisite interest in the controversy to warrant intervention as of right.

2. Intervention by Permission

In erroneously attempting to demonstrate that its intervention is a matter of right, the Chamber has instead demonstrated that it is not a proper party for permissive intervention. The Chamber states that it is "the only advocate of the federal position. . . ." (Petition, p. 7). To qualify for permissive intervention the applicant must assert a claim or defense having a common question of law or fact with the main action (Fed. R. Civ. Proc., Rule 24(b)(2); NYCPLR, §1013). Since the Chamber neither receives nor pays welfare there is clearly no common question of fact. As the "*only* advocate of the federal position" in this declaratory judgment action, it has not presented a common question of law.

Additionally, the Chamber has never submitted a pleading setting forth its claim or defense [*See*, Fed. R. Civ. Proc., Rule 24(c)]. Therefore, its application for intervention could not be granted [*See*, *Abramson* v. *Pennwood Investment Corp.*, 11 FR Serv. 2d 24c.13, Case 1, p. 718 (E.D.N.Y. 1967) *aff'd*. 11 FR Serv. 2d, 24c.13, Case 2 (2nd Cir. 1968)].

7/ *Wolpe* v. *Poretsky*, 144 F.2d 505 (D.C. Cir.) *cert. den.*, 323 U.S. 777 (1944) (Petition, p. 6).

8/ *New Orleans Water Works Co.* v. *New Orleans*, 164 U.S. 471 (1896) (Petition, p. 6).

9/ *Western Union Company* v. *Pennsylvania*, 368 U.S. 71 (1961) (Petition, p. 6-7).

Any allegation that the courts below abused their discretion in denying the Chamber's intervention has already been rejected by this Court. In *U.S. Chamber of Commerce* v. *Francis*, 41 U.S.L.W. 3199 (U.S. October 17, 1972) where the right of strikers to receive welfare assistance was presented, the Chamber appealed its denial of party status. In that case, addressing itself to whether the denial was an abuse of discretion, this Court held:

> "[P]etition by United States Chamber of Commerce to intervene in suit challenging Maryland rule, wherein Chamber was given opportunity both in written and oral argument to present its contentions, is denied, there being 'no reason to permit the same'. (Appeal Dismissed.)"

The Chamber, of course, presented its contentions, both in writing and orally before the New York Court of Appeals in this case.

The Chamber's assertion that it has been denied the "right" to obtain review in this matter (Petition, p. 8), begs the question. Since the Chamber does not, as demonstrated, *supra*, have the requisite interest to intervene, it has no "right" to seek review.

II

THERE IS NO CONFLICT OF DECISION.

Despite the Chamber's persistent attacks, the right of strikers to receive welfare assistance, where statutorily authorized, has uniformily been upheld [*See, Russo* v. *Kirby*, 335 F.Supp. 122 (E.D.N.Y.) *rev'd on other grounds*, 453 F.2d 548 (2nd Cir. 1971); *ITT Lamp Div.* v. *Minter*, 435 F.2d 989 (1st Cir.) *cert. denied*, 402 U.S. 933 (1970); *Lascaris* v. *Wyman and Bugnacki, et al., supra; Strat-O-Seal Mfg. Co.* v. *Scott*, 72 Ill. App.2d 480, 218 N.E.2d 227 (1966); *Cf., Francis* v. *Davidson*, 340 F.Supp. 351, *aff'd sub nom., Davidson* v. *Francis*, 41 U.S.L.W. 3199 (U.S. October 19, 1972), *appeal dismissed sub. nom., U.S. Chamber of Commerce* v. *Francis*, 41 U.S.L.W. 3199 (U.S. October 17, 1972); *Super Tire Engineering Co.* v. *McCorkle*, —F. Supp.— ( ) *vacated as moot*, 469 F.2d 911 (3rd Cir. 1972) *pet. cert. pend.*, 72-1554]. These courts have also consistently rejected the Chamber's contention that welfare payments to strikers are

prohibited because of their impact on the collective bargaining process.

The Chamber erroneously asserts that "substantial. . . dissension. . . has been engendered by the absence of a definitive determination [on this issue]" (Petition, p. 8). In facts, as demonstrated, *supra*, there is no such dissension. The Chamber's conclusion was apparently reached by its failure to distinguish between welfare assistance and unemployment compensation.

The only two cases cited indicating that the impact on collective bargaining may be worth investigation concerned unemployment compensation, and not welfare assistance [*See, Grinnell Corporation* v. *Hackett*, 475 F.2d 449 (1st Cir. 1973) *pet. cert. pend.*, No. 72-1679; *Dow Chemical Company* v. *Taylor*, No. 38664]. In *Grinnell Corporation* v. *Hackett*, *supra*, at 453, the court specifically noted this distinction stating:

> "[W]e are not able to determine whether the state interest in unemployment compensation is the same, or as substantial, as the state interest in welfare . . . ."

The court thus left its holding in *ITT Lamp Div.* v. *Minter*, *supra*, dealing with welfare assistance, unaltered. In *ITT Lamp Div.* v. *Minter*, *supra*, at 994, the court carefully distinguished welfare and unemployment benefits:

> "[W]elfare programs, supplying unmet subsistence to families without time limitation, address a more basic social need than does unemployment compensation . . . ."

This distinction, as observed, is integral to the relevant cases, and was duly followed in this case. The decision below, therefore, is consistent with all other cases concerning welfare assistance.

III

THE DECISION BELOW IS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

This case presented the narrow issue of the construction of Section 131 of the New York Social Services Law in light of a recent amendment to the said statute. That the decision was based solely upon state grounds is clear. The New York Court of Appeals, 31 N.Y.2d 386, 394-95, stated:

> "In any event, in light of this State's long-standing administrative policy sanctioning assistance payments to strikers, the Legislature, if it considers such a policy impermissible, should manifest its design in clear and unmistakable terms. Until such time as it does, we construe the statute as it stands and has been administered."

The court's reference to federal decisions was in no way connected to the interpretation of the state statute. The construction of a state statute is peculiarily a state matter [*See, Miller's Executors* v. *Swann*, 150 U.S. 132, 136 (1893); *Interstate Railway Co.* v. *Massachusetts*, 207 U.S. 79, 84 (1907); *Louisville & Nashville R. Co.* v. *Western Union Telegraph Co.*, 237 U.S. 300, 302 (1915)].

Since this decision is based upon adequate and independent state grounds, this Court lacks jurisdiction to review this case [*Murdock* v. *City of Memphis*, 87 U.S. 590 (1874)].

IV

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

The Chamber asserts that an important Federal question is presented by the payment of welfare assistance to strikers. Numerous courts have examined this contention and have uniformly held that it "lacks substance" [*Lascaris* v. *Wyman and Bugnacki, et al., supra*, at 396; *Russo* v. *Kirby, supra; ITT Lamp Div.* v. *Minter, supra; Francis* v. *Davidson, supra; Cf., Dandridge* v. *Williams*, 397 U.S. 471 (1970)].

The Chamber's assertion that welfare payments destroy governmental neutrality mandated by federal labor policy has been amply exploded. In the decision below, the Court of Appeals observed:

> "[I]t seems manifest that public assistance serves a purpose quite different from— and, by that token, not in conflict with— that which underlies the State's policy of neutrality." (*Lascaris* v. *Wyman and Bugnacki, et al., supra*, 31 N.Y.2d, at 394).

That purpose is to provide sustenance to needy individuals (id).

This Court has rejected the proposition that questions like those asserted by the Chamber are Federal questions warranting review by the courts. In *Dandridge* v. *Williams, supra*, at 487, this Court stated:

> "[T]he intractable economic social, and even philosophical problems presented by public welfare assistance are not the business of this Court. . . . [T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."

The decision below was concerned with the interpretation of a state statute and was based upon state law. No Federal question, important or otherwise, was raised thereby.

V

THIS CASE IS PRESENTLY MOOT.

In February of 1972 the strike that precipitated this case was settled. Thus, since there is presently no case or controversy, this Court lacks jurisdiction to review the decision below [*See, Super Tire Engineering Company* v. *McCorkle*, 469 F.2d 911 (3rd Cir. 1972) *pet. cert. pend.*, No. 72-1554].

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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